90-1048

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Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

W. F. DEVELOPMENT CORPORATION, ET AL.,

Petitioner

v.

OFFICE OF THE UNITED STATES TRUSTEE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. CODE SECTIONS 101(13) AND 327(a) PROVIDE THAT AN ATTORNEY MUST BE A "DISINTERESTED PERSON" TO QUALIFY FOR EMPLOYMENT BY THE TRUSTEE OR DEBTOR IN POSSESSION. SHOULD THE "DISINTERESTED PERSON" STANDARD DEFINED IN CODE SECTIONS 101(13) AND 327(a) BE INTERPRETED SO STRICTLY AS TO SUPPORT A PER SE RULE OF DISQUALIFICATION BARRING THE SAME ATTORNEY FROM SIMULTANEOUSLY REPRESENTING DEBTOR GENERAL AND DEBTOR LIMITED PARTNERS DURING JOINTLY ADMINISTERED CHAPTER 11 CASES?

2. CODE SECTION 327(c) WAS AMENDED BY CONGRESS IN 1984 TO PERMIT THE SAME ATTORNEY TO SIMULTANEOUSLY REPRESENT THE TRUSTEE OR DEBTOR IN POSSESSION AND A CREDITOR OF THE DEBTOR UNLESS THERE IS AN "ACTUAL CONFLICT OF INTEREST." DOES A PER SE RULE OF DISQUALIFICATION BASED ON "POTENTIAL" CONFLICTS ARISING FROM INTERAFFILIATE CLAIMS VIOLATE THE INTENTION OF CONGRESS IN ENACTING CODE SECTION 327(c)?

3. CODE SECTION 328(c) PERMITS, BUT DOES NOT MANDATE, THE DENIAL OF COMPENSATION FOR CONFLICTUAL REPRESENTATION. DOES CODE SECTION 328(c) SUPPORT THE AUTOMATIC DISGORGEMENT OF ATTORNEYS' FEES WITHOUT REGARD FOR THE EQUITIES OF THE CASE?

4. DOES A PER SE RULE OF DISQUALIFICATION AND AUTOMATIC DISGORGEMENT OF ATTORNEYS' FEES CONFLICT WITH THE EQUITABLE ORIENTATION OF THE BANKRUPTCY COURT AND VIOLATE THE FIFTH AMENDMENT?

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LIST OF PARTIES

The parties to the proceedings below are as follows:

Petitioners:

W. F. Development Corporation
Golf Hills Apartments, Ltd.
Westover Valley, Ltd.
Lackland Court Apartments, Ltd.

There are no parent companies or subsidiaries of these partnership entities.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

W. F. Development Corporation, et al., Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") entered in the above-captioned case on July 13, 1990.

OPINIONS BELOW

The July 13, 1990, Panel Opinion of the Court of Appeals for the Fifth Circuit is reported at 905 F.2d 883 (Opinion attached as Appendix A).

On August 24, 1990, the Court of Appeals for the Fifth Circuit denied the

Debtors' Petition for Rehearing (Order attached as Appendix B).

The September 21, 1989, Memorandum Opinion and Order of the United States District Court for the Northern District of Texas (the "District Court") affirmed the Order of the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court") disqualifying Newbern and ordering disgorgement of all fees (Memorandum Opinion and Order attached as Appendix C).

The May 12, 1988, Order of the Bankruptcy Court disqualified Newbern and ordered the disgorgement of all fees (Order attached as Appendix D).

The July 19, 1988, Order of the Bankruptcy Court denied Petitioners' Motion for Rehearing (Order attached as Appendix E).

JURISDICTION

On July 13, 1990, the judgment of the United States Court of Appeals for the Fifth Circuit was entered in W.F. Dev. Corp. v. Office of the United States Trustee (In re W.F. Dev. Corp.), 905 F.2d 883 (5th Cir. 1990) ("W.F."). On August 24, 1990, the Fifth Circuit denied the Debtors' Petition for Rehearing. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the disqualification of an attorney under section 327(a) of title 11 of the United States Code (the "Code"), from simultaneous representation of both a debtor general partner and debtor limited partners during bankruptcy due to a potential conflict of interest, and the disgorgement of all fees under Code section 328(c). The Code sections pertinent to this case include sections 101(13), 327(a), 327(c), 328(c), and 723(b), as follows:

1. Section 101(13):

> (13) "disinterested person" means person that --
>
> (A) is not a creditor, an equity security holder, or an insider;
>
> (B) is not and was not an investment banker for any outstanding security of the debtor;
>
> (C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the

offer, sale, or issuance of a security of the debtor;

(D) is not and was not, within two years before the date of the filing of the petition, a director, officer or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and

(E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason.

2. Section 327(a):

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

3. Section 327(c):

(c) In a case under chapter 7, 12 or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case

the court shall disapprove such employment if there is an actual conflict of interest.

4. Section 328(c):

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

5. Section 723(b):

(b) To the extent practicable, the trustee shall first seek recovery of such deficiency from any general partner in such partnership that is not a debtor in a case under this title. Pending determination of such deficiency, the court may order any such partner to provide the estate with indemnity for, or assurance of payment of, any deficiency recoverable from such partner, or not to dispose of property.

11 U.S.C. §§ 101(13) (1978); 327(a) (1978), 327(c) (1984); 328(c) (1978); and 723(b) (1978).

STATEMENT OF THE CASE

This case presents an important federal question that recurs thousands of times every year in bankruptcy cases throughout the United States -- whether, and under what circumstances, the same attorneys may simultaneously represent affiliated debtors in jointly administered cases. In addressing that important question, the lower federal courts have developed sharply divided precedent. The sharply divided precedent results from difficulties encountered in interpreting the "disinterested person" standard of Code section 327(a). In the present case, the Fifth Circuit has become the first court of appeals to hold that the same attorney may not, as a matter of law, simultaneously represent partnership affiliates in their jointly administered chapter 11 cases.

This case involves the application of anti-conflict principles under the Code. To

qualify for appointment under Code section 327(a), an attorney must be a "disinterested person." Code section 101(13) defines the term "disinterested person." The penalty for not being a "disinterested person" may entail the denial of compensation under Code section 328(c).

This case requires interpretation of the "catch-all" clause of subsection 101(13)(E). Interpretation of the "catch-all" clause has posed great difficulties. The Fifth Circuit relied on the "catch-all" clause to support its per se rule. However, the lower federal courts disagree sharply concerning whether the "catch-all" clause precludes the simultaneous representation of affiliated debtors holding potentially conflicting interests.

The lower federal courts disagree concerning whether the pertinent statutory provisions should be interpreted literally.

Within a period of approximately three years, three separate federal courts of appeals have developed mutually inconsistent approaches to interpretation of the "disinterested person" standard. Not only is the approach developed by the Fifth Circuit in the present case inconsistent with prior decisions of the First and Second Circuits, it is inconsistent with prior decisions within the Fifth Circuit. Further, numerous district court and bankruptcy court decisions reflect the split of authorities. (Appendix F is a representative survey of conflicting decisions.)

Petitioners' business consists of owning and operating residential real estate. W.F. Development Corporation ("W.F.") is the general partner of Golf Hills, Westover, and Lackland, each of which is a Texas limited partnership. There are three shareholders of W.F., and a single limited partner in Golf Hills and Lackland. The business of each of

the debtor limited partnerships consists of owning and operating a single apartment complex. The schedules of creditors reveal considerable overlapping arising from interaffiliate guarantees.

Westover, Lackland, and Golf Hills, limited partners in W.F., filed chapter 11 petitions on October 10, 1987 (Westover), and November 3, 1987 (Lackland and Golf Hills). The Bankruptcy Court properly exercised jurisdiction over this case pursuant to 28 U.S.C. §§ 1334(b) and 157(a).

Petitioners timely filed applications to employ St. Clair Newbern III ("Newbern") as bankruptcy counsel pursuant to Code section 327(a) in all three cases. Newbern filed timely affidavits pursuant to Bankruptcy Rule 2014(a). After the first chapter 11 petition was filed by Westover, each subsequent application to employ Newbern dis-

closed the relationships among the related entities.

Copies of the applications were served on the United States trustee ("trustee"). No party in interest objected to Newbern's employment by the limited partners, and orders approving Newbern's employment were entered by the Bankruptcy Court in all three cases.

On December 1, 1987, W.F. filed a chapter 11 petition. On January 26, 1988, W.F. filed an application to employ Newbern as bankruptcy counsel under Code section 327(a). In compliance with Bankruptcy Rule 2014(a), Newbern filed an affidavit disclosing his representation of W.F.'s three limited partners.

On February 1, 1988, the Bankruptcy Court approved W.F.'s application to employ Newbern. On February 2, 1988, the trustee filed an objection to W.F.'s employment of

Newbern. On February 9, 1988, the Bankruptcy Court set aside its February 1, 1988, order.

On April 28, 1988, the Bankruptcy Court held a hearing on the trustee's objection to Newbern's employment by W.F. At that hearing, the trustee did not present any evidence or call any witnesses in support of the objection. At the conclusion of the hearing, the Bankruptcy Court granted the trustee's motion to disqualify Newbern. "Out of an abundance of precaution," the Bankruptcy Court also disqualified Newbern from representing Westover, Lackland, and Golf Hills. The Bankruptcy Court did not enter any findings of fact or conclusions of law to support the disqualifications.

The Bankruptcy Court order disqualifying Newbern from representing W.F.'s three limited partners was made sua sponte. No motion to disqualify Newbern from representing the limited partners had been filed by

the trustee or by any other party. Disqualification in those cases was not raised until the Bankruptcy Court ruled on the trustee's objection to Newbern's employment by W.F.

Subsequent to the hearing on April 28, 1988, the chapter 11 case of Golf Hills was dismissed.

On May 12, 1988, the Bankruptcy Court entered an order disqualifying Newbern and requiring him to refund all retainers and fees received in representing W.F. and its affiliates (the "Order of Disqualification and Disgorgement"). Disgorgement of fees was neither requested by the trustee nor discussed at the April 28, 1988, hearing.

On May 13, 1988 (W.F.), and May 23, 1988 (Westover and Lackland), Petitioners filed Motions for Rehearing, to Enter Findings of Fact and Conclusions of Law, to Enter Stay and to Consolidate. On July 18, 1988,

Petitioners' motion for rehearing was denied by the Bankruptcy Court.

On October 10, 1988, Petitioners filed a timely notice of appeal with respect to the Order of Disqualification and Disgorgement. The District Court properly exercised jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a). On September 21, 1989, the District Court affirmed the Order of Disqualification and Disgorgement.

On October 23, 1989, Petitioners filed a timely notice of appeal with respect to the District Court's Order affirming the Order of Disqualification and Disgorgement. The Fifth Circuit properly exercised jurisdiction over the appeal pursuant to 28 U.S.C. § 158(d).

On July 13, 1990, the Fifth Circuit heard oral argument and entered judgment affirming the Order of the District Court. On August 9, 1990, the Petitioners filed a Petition for Rehearing in the Fifth Circuit.

On August 24, 1990, the Fifth Circuit denied the Petition for Rehearing.

In affirming, the Fifth Circuit became the first federal court of appeals to hold that a per se conflict of interest exists whenever an attorney simultaneously represents debtor general and limited partners in jointly administered chapter 11 cases. In so holding, the Fifth Circuit deviated from its prior decision in Pierson & Gaylen v. Creel & Atwood (In re Consolidated BancShares, Inc.), 785 F.2d 1249, 1256 (5th Cir. 1986), aff'g in part, remanding in part, 49 Bankr. 467 (N.D. Tex. 1985). BancShares requires a "painstaking analysis of facts and precise application of precedent" to determine if "dual representation create[s] a legally disabling conflict of interest."

REASONS FOR GRANTING THE WRIT

Precedent regarding the propriety of simultaneous representation of affiliated

debtors is sharply divided. In holding that the "disinterested person" standard precludes the same attorney from representing partnership affiliates, as a matter of law, the decision of the Fifth Circuit conflicts with prior decisions of the First Circuit, the Second Circuit, the Fifth Circuit, and the Eighth Circuit, and with the decisions of numerous lower federal courts. The Court should not await a further split of authorities before ruling on an issue with profound implications upon the efficient functioning of the bankruptcy system.

The simultaneous representation of affiliated debtors has become standard practice in bankruptcy cases throughout the United States.[1] The standard practice of appointing the same attorneys to represent affiliated debtors reflects a divergence in

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1. Appendix G presents a non-exclusive list of cases permitting simultaneous representation.

practice from the strict enforcement of anti-conflict principles. The decision of the Fifth Circuit calls into question the propriety of simultaneous representation not only in partnership cases presently pending in the Fifth Circuit, but in virtually all cases involving simultaneous representation.

The continuation of divided precedent is contrary to efficient judicial administration. The application of conflict of interest principles is one of the most frequently litigated and appealed issues in the entire field of bankruptcy law; indeed, no other area of bankruptcy law has consistently produced a greater number of reversals on appeal. Further, the split of authorities among the lower federal courts has been a powerful incentive to forum shopping. The resolution of this issue should not depend upon the fortuity of the jurisdiction in which bankruptcy cases are filed.

The "clear rule" adopted by the Fifth Circuit contributes to a badly divided precedent that has provided fertile ground for imprecision, confusion, mis-citation, and tactical abuses. Tactical manipulation of ethical principles requires debtors to devote limited resources to unwarranted satellite litigation and operates as a disincentive to aggressive debtor representation. The manipulation of ethical principles diverts attention from the central purposes of the Code and does nothing to increase public confidence in the integrity of the bankruptcy system.

The didactic approach adopted by the Fifth Circuit misconstrues Congressional intent, ignores prior decisions of this Court, and conflicts with the equitable orientation of the bankruptcy court. The essence of equity jurisdiction is the discretionary power to mold decrees on a case-specific

basis. The "clear rule" adopted by the Fifth Circuit cuts too sharply into the debtor's right to choose counsel at a difficult time and interferes unnecessarily with the attorney's right to practice the legal profession without undue restraint.

The Fifth Circuit's decision disserves the parties who must bear the enhanced administrative expenses entailed by the appointment of multiple attorneys. It creates more legal work for attorneys; however, it is bad for national bankruptcy policy. If followed, the decision would render the system inefficient by loading on excessive expense and delay. Although bankruptcy attorneys would have more legal work, creditors would obtain lower returns over longer periods.

Nearly fifty years ago, in Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262 (1941), the Court held that bankruptcy courts may exercise broad discretion over matters

pertaining to attorneys' disqualification and compensation. Since that time, the Court has not addressed the treatment of conflicts of interest in bankruptcy. The mercurial nature of the subject and the broad latitude accorded the bankruptcy courts precludes uniform results. However, the Court should exercise its supervisory authority over the lower federal courts and eliminate the adverse effects of sharply divided precedent. Prompt resolution of the issues created by the Fifth Circuit's per se rule and the establishment of a uniform precedent are badly needed.

I. THE FIFTH CIRCUIT'S PER SE RULE OF DISQUALIFICATION DIRECTLY CONFLICTS WITH RECENT DECISIONS OF OTHER COURTS OF APPEALS ON AN ISSUE WITH PROFOUND IMPLICATIONS UPON THE EFFICIENT FUNCTIONING OF THE BANKRUPTCY SYSTEM.

The Fifth Circuit became the first federal court of appeals to adopt a per se rule prohibiting simultaneous representation of a general partner and a limited partner

under Code section 327(a). The Fifth Circuit held that "when one attorney represents both the limited and the general partner in bankruptcy, there will always be a potential for conflict, and disqualification is proper." W.F., 905 F.2d at 884.

The "clear rule" adopted by the Fifth Circuit departs radically from the "case-specific" approach developed by the First Circuit in In re Martin, 817 F.2d 175 (1st Cir. 1987), vacating, 62 Bankr. 943 (D. Me. 1986). Consistent with its view that equitable principles must govern the exercise of bankruptcy jurisdiction, the First Circuit concluded that the inquiry into disinterestedness under Code section 327(a) must be "case-specific," and required the bankruptcy court to balance numerous factors.

In Martin, 817 F.2d at 175, the First Circuit reversed the holding that a mortgage granted by the debtor in lieu of a cash

retainer constituted an interest adverse to the estate. The bankruptcy court reasoned, therefore, that the attorney ran afoul of the "disinterested person" standard of section 327(a). Id. at 180. The First Circuit rejected a "literalistic reading" of section 327(a) because it "defies common sense and must be discarded as grossly over broad." Id. The First Circuit acknowledged that the Bankruptcy Code is "less than explicit in mapping the contours of the disinterestedness requirement." Recognizing the tension created by a literal interpretation of Code section 327(a), the First Circuit concluded that the statute "would not support either by its terms or by its objectives, a bright-line rule...." Id. at 181. In advocating a "case-specific" approach, the First Circuit recognized:

> The bankruptcy judge is on the front line, in the best position to gauge the ongoing interplay of factors and to make the delicate judgment calls which such a

> decision entails. If he perceives a materially adverse interest, he has at his disposal an armamentarium of permissible remedies....

Id. at 182-83.

The First Circuit's decision in Martin is consistent with prior decisions of the Second Circuit, which adopted a balancing "wait and see" approach to the treatment of potential conflicts of interest arising from the simultaneous representation of affiliated debtors. See Katz v. Kilsheimer, 327 F.2d 633 (2d Cir. 1960); In re International Oil Co., 427 F.2d 186 (2d Cir. 1970).

By contrast, the Fifth Circuit concluded that an evidentiary record and findings of fact were unnecessary, "because this case is not fact specific." W.F., 905 F.2d at 884. The Fifth Circuit concluded that the potential for conflict would arise in any case of dual representation; thus, disqualification is "proper" without regard for balancing the equities of the case. Id.

The Fifth Circuit's inadequately reasoned two-page opinion rests on three insufficient supports. First, the court concluded that "adverse interests" result, because a "nondebtor general partner's assets will be tapped to cover deficiencies in a limited partnership's estate." W.F., 905 F.2d at 884. The court cited Code section 723(b) to support its finding that materially adverse interests result in all similar cases.

The Fifth Circuit's reliance on Code section 723(b) in these chapter 11 cases is curious. In In re Vanderbilt Assoc., 117 Bankr. 678 (D. Utah 1990), rev'g, 111 Bankr. 347 (Bankr. D. Utah 1990), the district court reversed a bankruptcy court opinion based on similar rationale. In that case, the bankruptcy court likewise held that Code section 723(b) prohibited simultaneous representation of two limited partnerships with the same general partner. Id. at 680. The district

court first observed that "[w]hatever the source of the rules, the inquiry is the same: does a conflict manifest itself sufficient to prohibit representation." Id. at 681. The district court held that the bankruptcy court's legal conclusion was incorrect, because Code section 723(b) does not apply in chapter 11 cases. Further, even if Code section 723(b) did apply, the district court concluded, simultaneous representation would not be prohibited, because an "actual" conflict had not been shown to exist. "By its own terms," the district court further concluded, "several contingencies would have to occur before a conflict would exist. Thus, by definition, the conflict is potential, not actual." Id. at 681. Given the fact that the contingencies might never occur, the district court concluded that continuation of the simultaneous representation was "cost-

efficient to the debtors and consequently beneficial to the creditors...." Id. at 682.

Second, the Fifth Circuit cited dicta in In re McKinney Ranch Assoc., 62 Bankr. 249, 255 (Bankr. C.D. Cal. 1986), for the proposition that the representation of the general partner "will always disqualify" an attorney from representing the limited partner.[2] The Fifth Circuit ignored the rejection of a per se rule by the Ninth Circuit Appellate Panel. In Andrew v. Coopersmith (In re Downtown Inv. Club III), 89 Bankr. 59 (Bankr. 9th Cir. 1988), the appellate panel rejected McKinney's per se rule. Id. at 64. ("[W]e do not believe that it is necessary to

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2. The Fifth Circuit ignored the context in which the conflict issue arose in McKinney. In that case, the debtors' attorney failed to comply with Bankruptcy Rule 2014(a). Consequently, the bankruptcy court had not authorized his employment under Code section 327(a). Many courts have held that the failure to obtain appointment under Code section 327(a) constitutes an independent basis for denial of compensation. The bankruptcy court, however, did not deny the attorney's request for a nunc pro tunc order. It indicated a willingness to permit the attorney to continue representing one client and to withdraw from representing the other client upon the consent of both clients.

lay down such a hard and fast rule.") The appellate panel found a disqualifying conflict only in a case with "actual and irreconcilable conflicts of interest."

Third, the Fifth Circuit relied on dicta in In re Kendavis Indus. Int'l, Inc., 91 Bankr. 742 (Bankr. N.D. Tex. 1988), to support its strict view. Although Kendavis involved the propriety of simultaneous representation of a close corporation and its dominant shareholder, the bankruptcy court expressed a perceived need to strictly enforce conflict principles in partnership cases. Id. at 754. Unlike the present case, the disqualification and denial of fees in Kendavis was based on a sufficient evidentiary record and supported by extensive findings and conclusions. Moreover, the bankruptcy court did not apply a strict fee penalty, but balanced the competing equities

in approving partial compensation. Id. at 762.

The conflicting approaches to interpretation of the "disinterested person" standard developed by the First and Fifth Circuits fall at either end of a spectrum. Approaches taken by other federal courts fall in the middle. The Eighth Circuit in Pierce v. Aetna Life Ins. Co. (In re Pierce), 809 F.2d 1356 (8th Cir. 1987), and in Merrimac Assoc., Inc. v. Daig Corp. (In re Daig Corp.), 799 F.2d 1251 (8th Cir. 1986), took a strict constructionist approach to the interpretation of Code section 101(13)(A). In rejecting the policy arguments found persuasive by the First Circuit in Martin, the Eighth Circuit held that the express language of Code section 101(13)(A) automatically bars attorneys who are creditors or equity holders from qualifying for appointment as "disinterested persons" under Code section 327(a).

Therefore, the Eighth Circuit refused to apply a balancing analysis. The Eighth Circuit noted in both cases that "the professional's complaint in the area lies with Congress, not the courts." Pierce, 809 F.2d at 1363 (citing Daig, 799 F.2d at 1253 n.5).

The difficulties presented by the "disinterested person" standard are reflected in the reversal by the Sixth Circuit in the earlier decision of Hunter Savings Ass'n v. Baggott Law Offices Co. (In re Georgetown of Kettering, Ltd.), 750 F.2d 536 (6th Cir. 1984). In that case, the Sixth Circuit took a similar strict constructionist approach in interpreting the predecessor of Code section 327(c). The Sixth Circuit reversed the decision of the district court and held that the express statutory language foreclosed the

policy-based, balancing approach taken by the bankruptcy court.[3]

The strict constructionist approach taken by the Sixth and Eighth Circuits conflicts with the case-specific, balancing approach developed by the First Circuit in Martin. The strict constructionist approach also differs from a fourth approach -- the strict enforcement approach. The Fifth Circuit's adoption of a per se rule in the present case represents an extension of the strict enforcement approach.

Strict enforcement depends on a broad interpretation of the "catch-all" clause rather than on a literal enforcement of stat-

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3. The bankruptcy court had concluded that the "legal guidelines must be tempered in a chapter 11 context by the reality that there is an inherent interplay of conflicts of interest." In re Georgetown of Kettering, Ltd., 28 Bankr. 120 (Bankr. S.D. Ohio 1983). The bankruptcy court reasoned that the influences to be prohibited are "only the harmful influences within the realms of extreme practicality." Id. at 126. The statutes and applicable rules, the court concluded, were "enacted and adopted to implement court discretion." Application of the statutes and rules in an arbitrary manner constitutes "an abdication of a very complex judicial function." Id. at 133.

utory language. Because the phrase "adverse interests" found in the "catch-all" clause is not defined in either the Bankruptcy Code or legislative history, courts must look outside the statute for meaning. Thus, strict enforcement is predicated on judicial precept that simultaneous representation should be precluded in most cases (even without proof of an "actual" conflict of interest) to avoid an "appearance of impropriety."

The split of authorities is clear. The Fifth Circuit has interpreted the "disinterested person" standard to support a per se rule of disqualification. The First and Second Circuits have adopted a balancing approach emphasizing the exercise of judicial discretion on a case by case basis. The case-specific approach permits the bankruptcy court to balance competing Code policies, such as the goal of rehabilitation, cost, and efficiency of administration. Additionally,

it permits consideration of the debtor's right to counsel of choice:

> A court must balance the right to freely choose counsel, the need to maintain ethical standards, the interest of justice, evidence of actual impropriety, and its own ability to continuously control its officers and use the remedy of disqualification if called for.

In re Stamford Color Photo, Inc., 98 Bankr. 135, 137 (Bankr. D. Conn. 1989). By contrast, the Fifth Circuit's per se rule requires the appointment of multiple attorneys without regard for competing Code policies.[4]

A significant number of lower federal courts have recognized the split of authorities and followed the First Circuit in apply-

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4. If cost/benefits are not considered, multiple attorneys would be required in jointly administered cases involving numerous affiliates. For example, in In re DRW Prop. Co. 32, 54 Bankr. 489 (Bankr. N.D. Tex. 1985), the same attorney represented 85 limited partnerships seeking substantive consolidation with 109 partnership affiliates. A per se rule could have resulted in the appointment of 85 separate attorneys.

ing a flexible, case-specific approach.[5] As observed by one bankruptcy court:

> There is a split of authority regarding the test for disqualification of an attorney. One line of cases applies a rigid, strict constructionist rule, holding that even a potential conflict of interest or an "appearance of impropriety" is enough to merit disqualification.... Courts in other circuits have held that a potential conflict of interest generally is not disqualifying as long as no actual conflict develops.

H&K Developers v. Waterfall Village of Atlanta, Ltd. (In re Waterfall Village of Atlanta, Ltd.), 103 Bankr. 340 (Bankr. N.D.

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5. Many recent cases express a preference for a flexible, case-specific approach. See, e.g., Michel v. Carter (In re Carter), 116 Bankr. 123 (E.D. Wis. 1990), aff'g, 101 Bankr. 563 (Bankr. E.D. Wis. 1989) (rejecting per se rule adopted in Pierce, following Martin, and holding that "a person who fits the Code's definition of 'creditor' is not per se an interested person"); In re Peck, 112 Bankr. 485 (Bankr. D. Conn. 1990) (adopting a "restrained approach that focuses primarily on preserving the trial process" and guarding against tactical abuses); United States Trustee v. PHM Credit Corp. (In re PHM Credit Corp.), 110 Bankr. 284 (E.D. Mich. 1990) (rejecting the United States trustee's "hypertechnical position ignoring the fundamental economic realities of the case," and refusing to disqualify attorneys ir the absence of "any actual harm or impropriety," due to "delay and extra expense"); In re Kelton Motors, Inc., 109 Bankr. 641 (Bankr. D. Vt. 1989) (concluding that court must balance several competing interests including right to choice of counsel, and needs of efficient judicial administration against the potential advantage of immediate measures).

Ga. 1989). "While some courts do interpret s. 327(a) literally, the better analysis is to balance the risk and gravity of the potential conflict of interest with the costs that the estate and perhaps the public would incur in the event of disqualification of the professional." In re Federated Dept. Stores, Inc., 114 Bankr. 501, 504 (Bankr. S.D. Ohio 1990) (rejecting strict construction of Code section 101(13)(B)).

Whether the split among the circuits is resolved in favor of a flexible balancing approach or a strict constructionist approach to the interpretation of Code section 101(13)(A)-(D), the enactment of subsections 101(13)(A)-(D) and former Code sections 327(c) and 1103(b) demonstrates that Congress relied on express language when it intended to enforce strict prohibitions against simultaneous representation. In light of the enactment of those express prohibitions, it

is illogical to conclude that Congress intended the "catch-all" clause of Code section 101(13)(E) to support the per se rule adopted by the Fifth Circuit.

A more flexible approach appears to be supported by the present statutory scheme. The express statutory presumptions against simultaneous representation set forth in former Code sections 327(c) and 1103(b) proved to be unworkable. In 1984, Congress amended sections 327(c) and 1103(b) and retracted the statutory presumptions against simultaneous representation.

Section 327(c) no longer presumes that representation of the debtor and the debtor's creditor is inherently conflictual. The amendment favors "a more flexible, reasonable approach." In re Roberts, 75 Bankr. 402, 409-10 (D. Utah 1987), aff'g in part, modifying in part, and remanding, 46 Bankr 815 (Bankr. D. Utah 1985) (holding that simulta-

neous representation is not prohibited without substantiation of an "actual" conflict of interest). To the extent that Code section 327(c) is applicable to interaffiliate claims, the amendment reinforces the flexible, case-specific approach developed by the First Circuit.

Congress's apparent intention in amending Code section 327(c) was to permit more judicial discretion than was permitted under the former statute; nonetheless, the amendment has fueled a further split of authorities among the lower federal courts. The reported decisions have taken three mutually inconsistent approaches to interpreting present Code section 327(c). The critical point of disagreement concerns whether an "actual" conflict of interest is required to disqualify an attorney under the "disinterested person" standard as opposed to a "potential" conflict.

Two diametrically opposed positions have emerged from the Texas bankruptcy courts. In In re Global Marine, Inc., 108 Bankr. 998 (Bankr. S.D. Tex. 1988), appeals dismissed, 108 Bankr. 1007, 1009 (S.D. Tex. 1988), the bankruptcy court stated its view that "there is a fundamental distinction between the 'potentially' conflicting interests that may arise in every instance of joint representation and an 'actual conflict of interest' as envisioned by § 327(c). The representation of entities with potentially conflicting interests does not violate § 327(c)." Id. at 1004 (emphasis in original).

In refusing to disqualify attorneys from the simultaneous representation of a chapter 11 parent corporation and fourteen of its wholly owned subsidiaries, the bankruptcy court in Global Marine cited prior decisions of the Second Circuit. 108 Bankr. at 1003

(citing In re International Oil Co., 427 F.2d at 186 and Katz v. Kilsheimer, 327 F.2d at 633). In those cases, the Second Circuit relied on the dichotomy between "potential" and "actual" conflicts of interest to sustain simultaneous representations of affiliated corporations holding substantial inter-affiliate debt.

The Fifth Circuit implicitly rejected the approach of the Second Circuit relied on in Global Marine. Instead, it has preferred the strict approach taken by the bankruptcy court in Kendavis, 91 Bankr. at 742. The Fifth Circuit attempted to distinguish Global Marine; however, case law does not recognize a special exception involving the representation of partnership affiliates. The "potential" conflicts that arise in a partnership context are no different than those at issue in Global Marine. Further, Kendavis did not arise in the partnership

context. Kendavis held that the simultaneous representation of a debtor corporation and its dominant shareholder involved disqualifying conflicts. The bankruptcy court simply expressed its view that the holding of the case ought to be extended to the partnership context. 91 Bankr. at 754.

In Kendavis, the bankruptcy court strayed widely from the decisional facts to create a rift with the Global Marine decision. As stated in the court's opening remarks:

> [T]his case demonstrates the problems inherent in a popular theory regarding representation of Debtors in bankruptcy, the concept of the "potential" conflict of interest. Ultimately, the court demonstrates what happens when a case is allowed to proceed with a "potential" conflict of interest, and the court is hopeful that it has demonstrated that a "potential" conflict is a contradiction in terms.

91 Bankr. at 744. The bankruptcy court ignored Congressional intent in amending Code section 327(c), and chose to express its own

viewpoint: "Once there is a conflict, it is actual -- not potential." Id. at 754 (emphasis in original).

Some bankruptcy courts have developed a third approach to interpreting Code section 327(c). See In re BH&P, Inc., 103 Bankr. 556 (Bankr. D.N.J. 1989), remanded, 119 Bankr. 35 (D.N.J. 1990); In re Lee, 94 Bankr. 172 (Bankr. C.D. Cal. 1988); Gill v. Sierra Pacific Constr., Inc. (In re Parkway Calabasas, Ltd.), 89 Bankr. 832 (Bankr. C.D. Cal. 1988). The approach taken by those courts departs from both Global Marine and Kendavis. Unlike Kendavis, those cases do not completely ignore Congressional intent in amending Code section 327(c). However, those cases create sweeping rebuttable presumptions against simultaneous representation. The presumptions represent an attempt to reconcile the language of section 327(c) with the courts' own views that conflict of interest

principles should be strictly enforced in bankruptcy.

In BH&P, 103 Bankr. at 556, the bankruptcy court concluded that the terms "actual" and "potential" conflicts merely "describe different stages in the same relationship." 103 Bankr. at 563. After expressing its view that actual and potential conflicts should generally not be treated differently,[6] the bankruptcy court endorsed broad presumptions against simultaneous representation. "Actual conflicts," the

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6. The contrasting approaches taken to interpretation of "potential" conflicts of interest by the courts in Global Marine and BH&P demonstrate the practical benefits of a "wait and see" approach. In both cases, the same creditor, Bank of New York ("BNY"), moved to disqualify the debtors' attorneys over protests that the challenges were asserted for tactical purposes. In Global Marine, the bankruptcy court rejected a preemptive challenge asserted in connection with an interim fee application. The debtors and BNY subsequently resolved their differences and no final appeal was taken on the merits of the disqualification motion. In BH&P, BNY filed an objection to a fee application and the bankruptcy court disqualified a common trustee and his professionals. Shortly thereafter, the trustee and BNY resolved the disputes that provoked the fee challenge. Thus, BNY has declined to participate in the trustee's appeal of the disqualification order both at the district court and circuit court levels.

court concluded, should result in automatic disqualification. Id. at 573. The court further observed that the court should "generally" disapprove the appointment of professionals with a potential conflict of interest, unless the professional establishes that there is "no other competent professional available" or the "possibility that the potential conflict will become actual is remote and the reasons for employing the professional in question are particularly compelling." Id. at 573.

At the present time, none of the federal courts of appeals have adopted the approach taken in BH&P. However, the decision was affirmed on appeal by the district court, 119 Bankr. 35, and is presently pending for decision before the Third Circuit under Civil Action No. 89-4401.

Finally, although not a separate approach, the federal courts of appeals dis-

agree on the impact that the ABA Code of Professional Responsibility (1970) or the ABA Model Rules of Professional Conduct (1983) should have on interpreting anti-conflict principles under the Bankruptcy Code. Some courts, such as the First Circuit in Parker v. Frazier (In re Freedom Solar Center, Inc.), 776 F.2d 14, 16 (1st Cir. 1985), rev'g, 49 Bankr. 996 (D. Me. 1985), have analyzed the "disinterested person" standard in light of the state professional codes. As in the present case, other courts have analyzed "disinterestedness" without reference to the professional codes.

In addition to forging a conflict with other federal courts of appeals, the Fifth Circuit's decision in the present case cannot be reconciled with its own prior decisions. The decision in this case conflicts with the approach taken by the Fifth Circuit in Banc-Shares, 785 F.2d at 1249. In that case, the

Fifth Circuit vacated the lower court's decision with respect to the propriety of simultaneous representation of a corporate debtor and its directors. On remand of that single issue, the Fifth Circuit directed the bankruptcy court "to make such additional findings and conclusions, on an enlarged record if necessary, in order to elucidate whether [the attorney's] admitted dual representation created a legally disabling conflict of interest." Id. at 1256 (emphasis added). The Fifth Circuit rejected the bankruptcy court's "bare bones conclusion that there was no actual conflict of interest," because it did not "provide sufficient information to permit effective review." Id.

The procedures followed in the present case fall far short of the requirements stated in BancShares. 785 F.2d at 1257. In that case, and many others, the Fifth Circuit has recognized that an evidentiary hearing is

required on disputed factual issues involving disqualification and awards of attorneys' fees. Id. The procedures followed in this case depart from consistent practice among the lower federal courts; indeed, the decision raises significant due process concerns.

Citing Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 173-74 (5th Cir. 1979),[7] the court enunciated a clear standard by which to assess whether competing interests are "materially adverse" and,

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7. In Brennan's, Inc., the Fifth Circuit stated:

> When dealing with ethical principles, we cannot paint with broad strokes. The lines are fine and must be so marked. Guideposts can be established when virgin ground is being explored and the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent.

Brennan's, Inc., 590 F.2d at 173-74 (quoting Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 227 (2d Cir. 1977) (quoting United States v. Standard Oil Co., 136 F. Supp. 345, 367 (S.D.N.Y. 1955)).

therefore, disqualifying. 785 F.2d at 1256. The court observed that the Fifth Circuit requires a "painstaking analysis of the facts and precise application of precedent." Id.

Despite the Fifth Circuit's admonition that the lower courts should precisely apply precedent before disqualifying an attorney, BancShares contributes to the development of imprecise precedent. At first blush, the Fifth Circuit appears to endorse strict enforcement by observing that "strict standards are necessary in light of the unique nature of the bankruptcy process."[8] BancShares, 785 F.2d at 1256 n.6. The court further suggested that the "catch-all" clause of

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8. Other authorities suggest that the "unique nature of the bankruptcy process" has fostered a relaxed approach to the treatment of conflicts of interest. See, e.g., In re Flanigan's Enter., Inc., 70 Bankr. 248, 250 (Bankr. S.D. Fla. 1987) (observing that the Code specifically permits "certain representations which have a built-in appearance of conflict of interest"). One commentator recognizes that the framework for determining ethical issues in bankruptcy is inadequate given the rich potential for conflict resulting from the multiplicity of parties with diverse interests. Ayer, How to Think About Bankruptcy Ethics, 60 Am. Bankr. L.J. 355, 386 (1966).

Code section 101(13)(E) should be broadly interpreted. Id. However, the Fifth Circuit did not apply the strict standard that it recited. The record was sufficient to establish that the bankruptcy court had expressly disapproved a contingency fee-splitting arrangement entered by counsel. Id. at 1257. Moreover, the debtor's attorney simultaneously represented "at least one director of the debtor in several pieces of litigation," and "did not investigate the acts of the directors for potential liability to the estate." Id. at 1255-56. Thus, the simultaneous representation involved more than "an indirect or remote association or affiliation" that could have affected the impartiality of the attorney in the "slightest degree." Id.

Bancshares is consistent with a flexible, case-specific approach that recognizes considerable discretion in the bank-

ruptcy court. The Fifth Circuit did not apply a per se approach; instead, it remanded with instructions for the bankruptcy court to ascertain whether an "actual" conflict of interest existed. Id. 1258. Further, the Fifth Circuit observed that "upon reconsideration, the bankruptcy court may adhere to its conclusion in this case that there was no conflict of interest." Id. at 1256 n.7.

The Fifth Circuit's per se rule of disqualification cannot be reconciled with its prior decisions interpreting Canon Nine of the ABA Model Code of Professional Responsibility. Although the strict enforcement approach appears to be grounded in an analysis of Canon Nine, the Fifth Circuit's prior decisions have never held that the "appearance of impropriety" supports a per se rule. Conversely, in interpreting Canon Nine, the Fifth Circuit consistently has favored a balancing analysis applied on a case by case

basis and rejected an inflexible application of Canon Nine, because it "would frequently defeat important social interests including the client's right to counsel of his choice, [and] the lawyer's right freely to practice his profession...." Woods v. Covington County Bank, 537 F.2d 804, 812 (5th Cir. 1976); In accord Kraft, Inc. v. Alton Box Board Co. (In re Corrugated Container Anti-trust Litig.), 659 F.2d 1341, 1345-49 (5th Cir. 1981); Brennan's, Inc., 590 F.2d at 172.

Finally, the Fifth Circuit's per se rule of disqualification is inconsistent with its prior decision in Fanelli v. Hensley (In re Triangle Chem., Inc.), 697 F.2d 1280 (5th Cir. 1983). In that case, the Fifth Circuit considered whether the requirements of the bankruptcy statutes and rules should be interpreted literally to preclude the bankruptcy court, as a matter of law, from entering a nunc pro tunc order to authorize an

attorney's appointment under Code section 327(a). The Fifth Circuit concluded that the bankruptcy court should not be bound by a per se rule.

The court's rejection of a per se rule in Triangle Chem. is grounded in its conclusion that the bankruptcy court "exercises powers of a court of equity, and equity principles govern the exercise of its jurisdiction." Id. at 1288 (citing Bank of Marin v. England, 385 U.S. 99 (1966). The court held that "neither bankruptcy statute nor rule precludes the bankruptcy judge in the exercise of his sound discretion, and as a court of equity administering equitable principles," from entering a nunc pro tunc order authorizing employment. Similarly, equitable principles should preclude the adoption of a per se rule in the present related context involving interpretation of Code section 327(a).

II. **THE FIFTH CIRCUIT'S PER SE RULE OF DISQUALIFICATION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND WITH THE EQUITABLE ORIENTATION OF THE BANKRUPTCY COURT.**

The Fifth Circuit's per se rule conflicts with the prior decision of the Court in Woods, 312 U.S. at 262. In Woods, the Court based its decision on the existence of an "actual" conflict of interest substantiated by an evidentiary record. Id. at 269. In contradistinction to the Fifth Circuit's conclusion that it had "a full understanding of the issues" without an evidentiary record, W.F., 905 F.2d at 885, this Court has acknowledged the necessity of referring to the lower court's findings, noting that "[t]he findings of the District Court that these claimants represented conflicting interests are amply supported by the evidence." Id. at 269-70. The Court's explicit and articulated reliance on the findings of the lower court implicitly rejects a per se

approach to the determination of conflicts, by stating that "[w]here an actual conflict of interest exists, no more need be shown ... to support a denial of compensation." Id. at 268 (emphasis added). Significantly, in overruling the Seventh Circuit, the Court noted that "[w]e do not believe the [court of appeals] was justified in disregarding the evidence and findings of fact as respects respondents' dual or conflicting interest in this reorganization." Id. at 264.

The Court's pronouncements in Woods did not result in clear instructions for the guidance of the lower federal courts. The decision often has been cited to support irreconcilable approaches to the treatment of conflictual representations.[9] Courts favor-

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9. A narrow interpretation of Woods leads to the conclusion that the "evils" to be "struck at" are breaches of the duty of loyalty and disclosure. Nonetheless, early decisions under the Code were animated by a broad interpretation of Woods and were primarily united in the conclusion that conflicts of interest are "a bad thing that should not be rewarded." In re Chou-Chen Chem., 31 Bankr. 842 (Bankr. W.D. Ky. 1983).

ing a lenient, balancing approach stress the Court's recognition of the broad discretion of the supervising court over bankruptcy attorneys. Conversely, courts favoring strict enforcement stress the Court's reliance on Weil v. Neary, 278 U.S. 160 (1929) ("What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases."). 312 U.S. at 268.

The decisional question before the Woods Court involved the power of the district court under Chapter X of the Bankruptcy Act to disallow compensation on the grounds that applicants "were serving dual or conflicting interests." 312 U.S. at 263. However, the Court also sanctioned broad latitude in the treatment of conflicts of interest due to the mercurial nature of the subject matter. Although Woods did sanction a prophylactic rule that has generated a

didactic approach to the treatment of conflicts of interest, the thrust of the opinion is properly directed at the breadth of the bankruptcy court's inherent power to fashion appropriate remedies rather than at the breadth of a prohibitive rule.

The Court sanctioned a severe fee penalty for conflictual representation, but remanded the case to the district court to permit the reimbursement of expenses that clearly benefitted the estate. 312 U.S. at 269-70. However, strict fee penalties were not applied consistently in cases under the Bankruptcy Act.

The automatic disgorgement of attorneys' fees as a consequence for simultaneous representation in the present case departs radically from the historical treatment of conflicts of interest by many lower federal courts. Beginning with Berner v. Equitable Office Bldg. Corp., 175 F.2d 218 (2d Cir.

1949), rev'g, Aranow, Brodsky, Einhorn & Dann v. Equitable Office Bldg. Corp., 174 F.2d 827 (2d Cir. 1949), a second line of cases decided under the Bankruptcy Act departed from the strict fee penalty sanctioned in Woods. In reversing a bankruptcy court's denial of compensation, the Second Circuit in Berner held that the diminishment of a fee award ought to be related to the gravity of a particular breach of fiduciary duty. Since compensation should be diminished in proportion to the harm done, the court reasoned, benefit to the estate was an appropriate mitigating consideration. See id. at 222-23.

Adopting a less harsh rule, the Second Circuit in Silbiger v. Prudence Bonds Corp., 180 F.2d 917 (2d Cir.), cert. denied, 340 U.S. 831 (1950), again expressed its view that the consequences of simultaneous representation ought to be relaxed in reorganization cases. Similarly, the Seventh Circuit

in Chicago & West Towns Ry. v. Friedman (In re Chicago & West Towns Ry.), 230 F.2d 364 (7th Cir.), cert. denied, 351 U.S. 943 (1956), diminished a fee award but refused to enforce a strict penalty. See also SEC v. Cogan, 201 F.2d 78 (9th Cir. 1951).

Some appellate courts have placed a burden on the bankruptcy court to justify the denial of attorneys' fees. For example, in In re Devers, 12 Bankr. 140 (D.C. 1981), appeal dismissed, 729 F.2d 863 (D.C. Cir. 1984), the district court advanced the reasoning of Berner by reversing and remanding a decision of the bankruptcy court, and holding that it is error to reduce an award of attorneys' fees on ethical grounds without specifically explaining the basis for decision. The district court held that the recognition of a breach of fiduciary duty is only the first step in reducing compensation on ethical grounds. Id. at 142. Bankruptcy courts,

the Devers court concluded, must also consider the nature of the breach, and determine the amount by which unethical conduct has reduced the value of services to the debtor's estate. Id.

Although agreeing with the "general rule" announced in Woods, the court in In re Watson Seafood & Poultry Co., Inc., 40 Bankr. 436 (Bankr. E.D.N.C. 1984), advocated an intermediate, balancing approach that stops short of the Devers holding. The court concluded that there should be sufficient flexibility to permit deviation from the general rule in "those cases where the need for attorney discipline is outweighed by the equities of the case." Id. at 440. Many other courts have recognized that Code section 328(c) requires the balancing analysis adopted in Watson. See, e.g., In re Roberts, 75 Bankr. at 412.

The language of Code section 328(c) permits the bankruptcy court to exercise considerable discretion in fee penalty cases. Code section 328(c) "vests the bankruptcy judge with the discretionary power to deny all compensation or to deny that portion of fees relating to any improper conduct." See In re Global Marine, Inc., 108 Bankr. at 1006. As a practical matter, strict fee penalties under Code section 328(c) have been almost universally aimed at reprehensible attorney misconduct or failures of disclosure.

The decision of the Fifth Circuit conflicts with Congressional intent under Code section 328(c). The record plainly reveals that neither misconduct nor failure of disclosure were present in this case. Without regard for the equities, the lower courts merely determined that disgorgement should be ordered as a consequence of simultaneous representation. Malfeasance has not been sug-

gested, let alone shown. A balancing of the equities reveals that Newbern fully disclosed the simultaneous representation and engaged in no specific identifiable misconduct. There is no evidence that the Bankruptcy Court even considered Petitioners' right to choose counsel, the absence of harm to Petitioners' estates, the benefits to be obtained by retaining simultaneous representation, the value of Newbern's services to Petitioners' estates, and the need for attorney discipline.

The federal courts of appeals, including the Fifth Circuit, have uniformly accorded the bankruptcy court broad discretion regarding the terms and conditions of attorneys' employment, disqualification, and compensation. Pierce, 809 F.2d at 1356; Daig, 799 F.2d at 1253; BancShares, 785 F.2d at 1252; In re NuCorp Energy, Inc., 764 F.2d 655, 657 (9th Cir. 1985); Stolkin v. Nachman,

472 F.2d 222, 228 (7th Cir. 1973). The establishment of a per se rule of disqualification and automatic disgorgement of fees impermissibly substitutes a hard and fast rule for the exercise of judicial discretion.

The Court has repeatedly recognized that the term "discretion" is inconsistent with the Fifth Circuit's decision in the present case:

> The term "discretion" denotes the absence of a hard and fast rule. When invoked as a guide to judicial action, it means sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

Langnes v. Green, 282 U.S. 531, 541 (1931) (citations omitted). See also The Styria v. Morgan, 186 U.S. 1, 9 (1902)("[T]he reasonable exercise of discretion must be considered and determined in light of the facts in each particular case. The establishment of a clearly defined rule of action would be the

end of discretion, and yet discretion should not be a word for arbitrary will or inconsiderate action.") (emphasis in original).

Fundamentally, the Fifth Circuit's error in adopting a per se rule represents a failure to recognize "the overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." Bank of Marin v. England, 385 U.S. at 103. As expressed by the Court:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.... In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests.

In re Main Line Motors, Inc., 9 Bankr. 782 (Bankr. E.D. Pa. 1981) (quoting Lemon v. Kurtzman, 411 U.S. 192, 200-01 (1973)) (emphasis added).

Equitable principles require adoption of a flexible, case-specific approach to interpretation of the "disinterested person" standard. The language of Code sections 101(13)(E) and 327(a) may not be read "with the ease of a computer." Marin, 385 U.S. at 103. The Fifth Circuit's strict interpretation of those Code sections defeats important countervailing policy considerations. More importantly, the Fifth Circuit's adoption of a per se rule contributes to badly divided precedent that has fueled the tactical manipulation of ethical principles, generated wasteful satellite litigation and attendant appeals, and diverted attention from the central purposes of bankruptcy law.

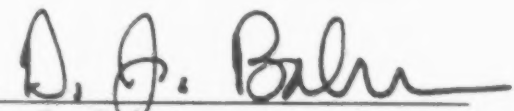
The Court should exercise its discretion by adopting a uniform approach to interpretation of the "disinterested person" standard. The adoption of a uniform standard would provide clear guidance for the benefit

of the lower federal courts and for the participants engaged in bankruptcy cases. The adoption of a uniform standard is needed to eliminate the growing adverse effects of irreconcilable precedent.

CONCLUSION

WHEREFORE, W. F. Development Corporation, et al., Petitioners, pray that a writ of certiorari issue from this Honorable Court to review the judgment of the Fifth Circuit in In re W. F. Development Corporation. If the petition is granted, Petitioners pray that the judgment of the Fifth Circuit be reversed, and that the cause be remanded with appropriate instructions to the Bankruptcy Court to issue findings of fact and conclusions of law consistent with the decision of this Honorable Court.

Respectfully submitted,



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Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 1990, three (3) copies of the Petitioners' Petition for Writ of Certiorari were mailed, postage prepaid, to Victoria Tutterrow, Office of the United States Trustee, Room 9-C-60, U.S. Courthouse, 1100 Commerce Street, Dallas, Texas 75242, and to the Solicitor General, Department of Justice, Washington, D.C. 20530. All parties required to be served have been served. I am a member of the Bar of this Court.

D. J. Baker

D. J. Baker
Counsel of Record

In re W.F. DEVELOPMENT CORPORATION, et al., Debtors.

W. F. DEVELOPMENT CORP.: Westover Valley, Ltd.; Golf Hills Apts., Ltd.; Lackland Ct. Apts., Ltd., Appellants,

v.

OFFICE OF THE UNITED STATES TRUSTEE, Appellee.

No. 89-7007.

United States Court of Appeals, Fifth Circuit

July 13, 1990.

Rehearing Denied Aug. 24, 1990.

St. Clair Newbern, III, Paula C. Conley, Law Offices of St. Clair Newbern, III, Fort Worth, Tex., for appellants.

Victoria B. Tutterrow, Office of the U.S. Trustee, Dallas, Tex., for appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before GARZA, HIGGINBOTHAM and DUHE, Circuit Judges.

GARZA, Circuit Judge:

Counsel for general partner and limited partners in bankruptcy proceedings was disqualified for conflict of interest. Because we find that the representation

presented a definite potential for conflict, we AFFIRM the disqualification.

FACTS

St. Clair Newbern, III, an attorney, represented Westover Valley, Ltd., Lackland Court Apartments, Ltd., and Golf Hills Apartments, Ltd., in their 1987 bankruptcy proceedings. The Debtors filed Applications to Employ Counsel, seeking court approval to employ him, for each action and served them on the United States Trustee; the court initially approved the employment. Then, in December, 1987, W.F. Development filed for bankruptcy protection, and again the Debtor applied to employ Newbern as counsel. But here Newbern notified the court that Westover, Lackland and Golf Hills were W.F. Development's limited partners. At this point, the U.S. Trustee objected to Newbern's employment and the court set aside its earlier approval.

After full hearings on the objection, the bankruptcy court disqualified Newbern from representing W.F. Development "out of an abundance of precaution." Though there had been no objection to Newbern's representing the limited partners, the court also disqualified Newbern from that representation. The district court affirmed the disqualifications and ordered disgorgement of fees. This appeal followed.

DISCUSSION

1. Disqualification

An attorney in a bankruptcy action must "not hold or represent an interest adverse to the estate" and must be "disinterested." 11

U.S.C. § 327(a). An attorney is "disinterested" when he "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to . . . the debtor. . . or for any other reason." 11 U.S.C. § 101(13)(E).

[1] In a bankruptcy proceeding, limited and general partners do hold materially adverse positions. A non-debtor general partner's assets will often be tapped to cover deficiencies in the limited partner's estate. 11 U.S.C. § 723(b). So, the bankruptcy court held, "out of an abundance of precaution," that Newbern ought to be disqualified from representing both sets of partners. We agree and adopt here a clear rule. When one attorney represents both limited and general partners in bankruptcy, there will always be a potential for conflict and disqualification is proper. Accord, In re McKinney Ranch Assoc., 62 B.R. 249, 255 (Bankr. C.D. Cal. 1986) (representation of general partner "will always disqualify" attorney from representing limited partner); In re Kendavis Industries International, Inc., 91 B.R. 742, 754 (Bankr. N.D. Tex. 1988) (dual representation presents an actual conflict).

[2] Newbern argues that the court below should have held a full evidentiary hearing and made a "painstaking analysis of the facts and precise application of precedent," Matter of Consolidated Bancshares, 785 F.2d 1249, 1256 (5th Cir. 1986), to determine whether there exists a real and specific conflict "factually substantiated on the evidentiary record." In re Global Marine, 108 B.R. 998 (Bankr. S.D. Tex. 1987). But that type of

hearing is not necessary in a limited/general partnership conflict. Because potential for conflict will always exist in this type of case, we will not ask a lower court to jump through hoops superfluous to the issue. We affirm the disqualification.

2. Findings of Fact

[3] Newbern also argues that the court below erred in failing to make specific findings of fact when requested, and asks that the case be remanded so the court can make those findings. "Normally when a trial court fails to make findings and an appeal is taken, the appellate court will vacate the judgment and remand the action for appropriate findings. . . [But, a] complete lack of findings does not necessarily require a reversal of the judgment if a full understanding of the issues on appeal can nevertheless be determined by the appellate court." In re Texas Extrusion Corp., 836 F.2d 217, 221 (5th Cir. 1988), cert. denied, 488 U.S. 926, 109 S.Ct. 311, 102 L.Ed.2d 330 (1988).

Because this case is not fact specific--a potential for conflict would arise in any case of such dual representation--we have a full understanding of the issues on appeal even absent findings of fact. We therefore affirm on this issue.

3. Due Process

[4] The U.S. Trustee had objected only to Newbern's representation of the general partner, but the bankruptcy court, sua sponte, disqualified Newbern also from representing the limited partners. Newbern argues that disqualification denied him due

process, as he had no notice or opportunity to be heard. Notice, to satisfy due process, must be reasonably calculated to inform parties of any proceedings which may affect them. North Alabama Express v. U.S., 585 F.2d 783, 786 (5th Cir. 1978); Mobil Exploration and Producing N.A. v. Federal Energy Regulatory Comm., 881 F.2d 193, 199 (5th Cir. 1989). Due process does not require notice of all possible ramifications of a hearing. In re Petro, 18 B.R. 566, 569 (Bankr. E.D. Pa. 1982).

Newbern had notice that the Trustee objected to his representing the general partner, and had a full hearing on that issue. That notice and hearing satisfy his due process rights as to representation of the limited partners.

For this reason and those stated above, the judgment of the district court is in all things AFFIRMED.

[ENTERED AUGUST 24, 1990]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-7007

IN THE MATTER OF: W.F. DEVELOPMENT CORPORATION, ET AL.,
Debtors.

W.F. DEVELOPMENT CORPORATION, ET AL.,
Appellants,

versus

OFFICE OF THE UNITED STATES TRUSTEE,
Appellee

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(August 24, 1990)

Before GARZA, HIGGINBOTHAM and DUHE, Circuit Judges.

B Y T H E C O U R T:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

//s//

United States Senior Circuit Judge

[Clerk's Note: See FRAP and Local Rules 41 for Stay of the Mandate

[U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

FILED SEP 21, 1989

NANCY DOHERTY CLERK

BY //s//
Deputy]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

W.F. DEVELOPMENT	§	
CORPORATION, ET AL.	§	CIVIL ACTION NO.
	§	4-88-533-K
VS.	§	(Consolidated with
	§	CA4-88-534-K and
OFFICE OF THE U.S.	§	CA4-88-535-K)
TRUSTEE	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is the captioned appeal from the Order Disqualifying Counsel entered by the United States Bankruptcy Court on May 12, 1988. The Court, having reviewed the record and the applicable law, is of the opinion that this case should be affirmed for the reasons that follow.

I. FACTS

This proceeding is a consolidation of three separately filed bankruptcy proceedings. W.F. Development Corporation is the general partner of Golf Hills Apartments, Ltd., Westover Valley, Ltd., and Lackland Court Apartments, Ltd., each of which is a Texas Limited Partnership.

On October 10, 1987, Westover Valley, Ltd. filed a proceeding under Chapter 11 in the United States Bankruptcy Court for the Northern District of Texas. An Application to Employ St. Clair Newbern, III was filed on November 16, 1987, and a copy was served on the Office of the United States Trustee. An Order Approving Employment was entered by the Bankruptcy Court on November 23, 1987.

Lackland Court Apartments, Ltd. filed a proceeding under Chapter 11 on November 3, 1987. On November 16, 1987, an

Application to Employ St. Clair Newbern, III, was filed, a copy was served on the Office of the United States Trustee, and an Order Approving Employment was entered by the Bankruptcy Court on November 23, 1987.

The W.F. Development Corp. (W.F.) bankruptcy case was commenced on December 1, 1987. An Application to Employ St. Clair Newbern, III, as counsel for W.F., was filed with the Bankruptcy Court on January 26, 1988, and was served on the Office of the United States Trustee. The application disclosed counsel's representation of the three related entities. On November 1, 1988, an Order was entered approving the Application to Employ. The next day, February 2, 1988, the Office of the United States Trustee filed an objection, and the Order of February 1, 1988, was set aside by the Bankruptcy Court on February 9, 1988.

Three separate hearings were conducted in connection with the United States Trustee's objections to employment of St. Clair Newbern as counsel in the W.F. proceeding. At the conclusion of the final hearing on April 28, 1988, the Bankruptcy Court, "out of an abundance of caution," disqualified St. Clair Newbern as counsel in the W.F. proceeding. The Bankruptcy Court also disqualified St. Clair Newbern as counsel in the three related proceedings (Westover Valley, Lackland Court, and Golf Hills) without an objection to his employment or a motion to disqualify ever having been filed by the United States Trustee. An Order setting out these rulings in writing, as well as requiring Mr. Newbern to refund to the debtors all fees and retainers received in connection with the above-listed cases was entered on May 12, 1988.

On Motion for Rehearing, the Bankruptcy Court refused to grant a rehearing, refused to enter Findings of Fact and Conclusions of Law, and refused to stay the proceedings pending appeal. Subsequent to the April 28, 1988 hearing, the Golf Hills bankruptcy proceeding was dismissed. Appellant filed Notice of Appeal on July 28, 1988. On October 4, 1988, this Court ordered sua sponte, that the Westover Valley and Lackland Court cases be consolidated into the W.F. proceeding for purposes of appeal.

II. JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a) and Bankr.R.Proc. 8001. Rule 8013 of the Bankruptcy Rules provides:

> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy court's judgment, order or decree or remand with instructions for further

> proceedings. Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Bankruptcy Rule 8013.

This Court is bound to accept the factual findings of the Bankruptcy Court unless such findings are clearly erroneous. Fed.R.Civ.P. 52(a); In re: Braniff Airways, Inc., 783 F.2d 1283, 1287 (5th Cir. 1986); In re: Missionary Baptist Foundation of America, 712 F.2d 206, 209 (5th Cir. 1983); In re: Bardwell, 610 F.2d 228, 230 (5th Cir. 1980). However, conclusions of law are "fully reviewable by this Court." Dallas/Fort Worth Regional Airport Board v. Braniff Airways, Inc., 26 Bankr. 628 (N.D. Tex. 1982).

III. ANALYSIS

Having reviewed the case law, the briefs, and the record on appeal, this Court is of the opinion that the Bankruptcy Court's Order of May 12, 1988, should be affirmed. Appellants contend that although Mr. Newbern represents both the general and limited partners in this partnership, there is no "actual" conflict of interest, and that without an actual conflict, disqualification is not warranted. Courts in this district have held, however, that even a possibility of conflict may warrant disqualification. In re: Michigan General Corp., 78 B.R. 479, 484 (Bkrtcy. N.D. Tex. 1987); quoting In re: Roger J. Au & Son, Inc., 64 B.R. 600, 606 (N.D. Ohio 1986). In fact, if there is any doubt as to the existence of a conflict, courts in this district have held that such doubt should be resolved in favor of disqualification. In re: Michigan General,

supra; quoting In re: Johore Investment Company, 49 B.R. 710, 713 (Bkrtcy. D. Hawaii 1985).

The fact that Mr. Newbern represents both general and limited partners in the same bankruptcy proceeding may, in itself, be a conflict of interest. As stated by the court in In re McKinney Ranch Associates,

> Counsel for the debtor will likely be required to examine the relations between the partnership and its general partners for possible claims against them. Thus the potential conflict in the representation of a general partner of a limited partnership will always disqualify an attorney from simultaneously representing the limited partnership as a debtor in possession or from representing the trustee of a limited partnership. In re McKinney Ranch Associates, 62 B.R. 249 (Bkrtcy. C.D. Cal. 1986), (emphasis added).

A bankruptcy court in this district went even further, stating:

> An attorney who claims to represent a partnership, but also has some agreement, whether express or implied, with the general or limited partners, or with any control person, to protect its interest, that attorney has an actual conflict of interest, and is subject to disqualification and a disallowance of fees. The concept of potential conflicts is a contradiction in terms. Once there is a conflict, it is actual--- not potential. In re: Kendavis Industries International, Inc., 91 B.R. 742, 754 (Bkrtcy, N.D. Tex. 1988).

Thus, it is clearly a conflict of interest for an attorney to represent both general and limited partners in the same bankruptcy proceeding, and disqualification and disallowance of fees are warranted under 11 U.S.C. §§ 101(13), 327, and 328.

Appellants further contend that Judge Tillman committed an abuse of discretion in not entering findings of fact and conclusions of law, pointing to Rule 52(a) of the Federal Rules of Civil Procedure as requiring them. In this instance, however, Rule 52(a) does exactly the opposite. The last sentence of the rule states: "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." (emphasis added). Rule 52(a) applies in this instance by way of Bankruptcy Rules 9014 and 7052. Rule 9014, concerning the conduct of contested matters in bankruptcy court, states in pertinent part, ". . . unless the court otherwise directs, the following rules shall apply: . . . 7052." Bankr.R.Proc. 9014. Rule 7052 simply states: "Rule 52 F.R.Civ.P.

applies in adversary proceedings." Bankr.R.Proc. 7052.

Indeed, it has been held that "the correct interpretation of these rules, (9014 and 7052) taken together, is that it is totally within the discretion of bankruptcy judges as to whether they wish to make any specific findings of fact and/or conclusions of law. . . in deciding any Motion except a Motion for involuntary dismissal, per Bankr.R. 7041 and F.R.Civ.P. 41(b)." The Campfire Shop, Inc. v. Strouse, Greenberg Mortgage Co., Inc. (In re: The Campfire Shop, Inc.), 71 B.R. 521, 524 (Bkrtcy. E.D. Pa. 1987).

Black's Law Dictionary defines a "motion" as: "An application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant." Black's Law Dictionary 913 (5th ed. 1979). Under the present

circumstances, this Court holds that the U.S. Trustee's Objection to Employment should be treated as a motion, since the U.S. Trustee was making a request to the Bankruptcy Court that it disqualify counsel from representing both the general and limited partners in this case. Therefore, as this was not a motion involving involuntary dismissal under Rule 41(b), pursuant to the authorities listed above, this Court holds that Judge Tillman was within his discretion when he entered his Order of May 12, 1988, without findings of fact or conclusions of law.

Appellants further contend that Judge Tillman committed an abuse of discretion in not granting their Motion to stay further proceedings in the case pending appeal of the Order of May 12, 1988. It is well established that the granting of a stay pending appeal of an order or judgment of the bankruptcy court is in the discretion of the

bankruptcy judge. In re: Charles & Lillian Brown's Hotel, Inc., 93 B.R. 49, 53 (Bkrtcy. S.D.N.Y. 1988); In re: Tulane Hotel Investors Ltd. Partnership, 68 B.R. 145, 147 (E.D. La. 1986); In re: Smith, 34 B.R. 144, 146 (Bkrtcy. D.Vt. 1983); In re: Neisner Brothers, Inc., 10 B.R. 299, 300 (Bkrtcy. S.D.N.Y. 1981).

As for the standards to be followed by the bankruptcy court in determining whether a stay pending appeal is warranted, most courts have applied the same prerequisites used for the issuance of an injunction under Rule 62(c) F.R.Civ.P.: (1) the moving party must make a strong showing that it is likely to prevail on the merits of its appeal; (2) the moving party must establish that it will suffer irreparable injury if the injunction is denied; (3) other parties must not be substantially harmed if the injunction is issued; and (4) the

issuance of the injunction must not be contrary to the public interest. In re: Smith, supra, at 145; citing Belcher v. Birmingham, 395 F.2d 685 (5th Cir. 1968). Bankruptcy courts have consistently held that these factors must be established before a stay pending appeal is issued. In re: Smith, supra, at 145, 146; In re: Candor Diamond Corp., 26 B.R. 844 847 (Bkrtcy. S.D.N.Y. 1983). Under the circumstances of the case at hand, this Court holds that Appellants failed to make a strong showing in the Bankruptcy Court that they would be likely to prevail on the merits of their appeal: they failed to adequately establish that it is not a conflict of interest for counsel to represent both general and limited partners in the same bankruptcy proceeding. Therefore, this Court holds that Judge Tillman was within his discretion when he refused to grant Appellants' Motion for stay

of bankruptcy proceedings pending appeal of his Order of May 12, 1988.

IV. CONCLUSION

This Court holds that the Bankruptcy Court's Order of May 12, 1988, ordering disqualification of counsel and disallowance of fees in the above-styled and numbered cause of action was proper. IT IS THEREFORE ORDERED, that the Bankruptcy Court's Order Disqualifying Counsel of May 12, 1988, be and is hereby AFFIRMED.

IT IS SO ORDERED.

SIGNED this 21st day of September, 1989.

//s//
DAVID O. BELEW, JR.
UNITED STATES DISTRICT JUDGE

[ENTERED May 12, 1988
United States Bankruptcy Court
Northern District of Texas]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE	§	
	§	
W.F. DEVELOPMENT CORP.	§	CASE NO. 487-43391-11
	§	
WESTOVER VALLEY, LTD.	§	CASE NO. 487-42686-11
	§	
GOLF HILLS APTS., LTD.	§	CASE NO. 487-43107-11
	§	
LACKLAND CT. APTS., LTD.	§	CASE NO. 487-43106-11
	§	
DEBTORS-IN-POSSESSION	§	

ORDER DISQUALIFYING COUNSEL

On the 28th of April, 1988, came again for hearing the Objection of the United States Trustee to Debtor's Application to Employ Counsel. Because it cannot be said that the interests of the debtor general partner are not materially adverse to the interests of the debtor limited partnerships,

and because counsel does not meet the definition of "disinterested person" of 11 U.S.C. § 101(13), it is hereby

ORDERED, in accordance with 11 U.S.C. §§ 105 and 327, that St. Clair Newbern, III is disqualified from representation of W.F. Development Corp. and its three debtor limited partnerships, Lackland Court Apartments, Ltd., Golf Hills Apartments Ltd. and Westover Valley, Ltd.

IT IS FURTHER ORDERED, in accordance with 11 U.S.C. § 328, that Mr. Newbern must refund to the debtors all fees and retainers that have been received in each of the above-styled cases.

Because it is not the intention of this Court to inject unnecessary delay into matters pending in these four cases, and because this Court recognizes the debtors' need for continuous representation,

IT IS ORDERED that Mr. Newbern may apply to this court for reasonable compensation for essential services rendered during the three weeks following the hearing of April 28, 1988.

Signed: May 12, 1988

//s//
MASSIE TILLMAN
UNITED STATES
BANKRUPTCY JUDGE

[ENTERED July 19, 1988
United States Bankruptcy Court
Northern District of Texas]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE	§	
	§	
W.F. DEVELOPMENT CORP.	§	CASE NO. 487-43391-11
	§	
WESTOVER VALLEY, LTD.	§	CASE NO. 487-42686-11
	§	
GOLF HILLS APTS., LTD.	§	CASE NO. 487-43107-11
	§	
LACKLAND CT. APTS., LTD.	§	CASE NO. 487-43106-11
	§	
DEBTOR-IN-POSSESSION	§	

ORDER DENYING MOTION FOR RE-HEARING AND/OR RECONSIDERATION, MOTION TO ALTER OR AMEND JUDGMENTS/ORDER, MOTION TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW, MOTION TO STAY EFFECT OF ORDER PENDING FURTHER HEARINGS AND/OR APPEAL, AND MOTION TO ADMINISTRATIVELY CONSOLIDATE FOR PURPOSES OF FURTHER HEARINGS

CAME ON for consideration on June 20, 1988, the above-styled motion. The court finds that said Motion should be DENIED.

SIGNED, this 18th day of July, 1988.

//s//
MASSIE TILLMAN
UNITED STATES BANKRUPTCY
JUDGE

	FIRST CIRCUIT **Court of Appeals**
balancing (rejects strict construction)	In re Martin 817 F.2d 175 (1st Cir. 1987), vacating, 62 Bankr. 943 (D.Me. 1986)
strict (rejects policy arguments)	Parker v. Frazier (In re Freedom Solar Center, Inc.) 776 F.2d 14 (1st Cir. 1985), rev'g., 49 Bankr. 996 (D.Me. 1985)

	SECOND CIRCUIT **Court of Appeals**
balancing	Berner v. Equitable Office Bldg. Corp., 175 F.2d 218 (2d Cir. 1949) rev'g., Aranow, Brodsky, Einhorn & Dann v. Equitable Office Bldg. Corp., 174 F.2d 827 (2d Cir. 1949)
balancing	Cosoff v. Rodman (In re W.T. Grant Co.) 699 F.2d 599 (2nd Cir. 1983), cert. denied, 464 U.S. 822 (1985)
balancing	In re International Oil Co., 427 F.2d 186 (2d Cir. 1970)
balancing	Katz v. Kilsheimer 327 F.2d 633 (2nd Cir. 1964)

balancing	Shaw & Levine v. Gulf & Western Industries Inc. (In re The Bohack Corporation) 607 F.2d 258 (2nd Cir. 1979)
balancing	Silbiger v. Prudence Bonds Corp., 180 F.2d 917 (2d Cir. 1950), cert. denied, 340 U.S. 813 (1950)
	Bankruptcy Court
strict construction	In re Intech Capital Corp. 87 Bankr. 232 (Bankr. D. Conn. 1988)
balancing	In re Kelton Motors, Inc. 109 Bankr. 641 (Bankr. D. Vt. 1989)
balancing	In re O.P.M. Leasing Services, Inc. 16 Bankr. 932 (Bankr. S.D.N.Y. 1982), aff'd in part, rev'd in part, 48 Bankr. 824 (S.D.N.Y. 1985)

balancing	In re Peck 112 Bankr. 485 (Bankr. D. Conn. 1990)
balancing	In re Stamford Color Photo, Inc. 98 Bankr. 135 (Bankr. D. Conn. 1989)
balancing	In re Watson Seafood & Poultry Co., Inc., 40 Bankr. 436 (Bankr. E.D.N.C. 1984)

	THIRD CIRCUIT **Bankruptcy Court**
strict	In re B H & P, Inc. 103 Bankr. 556 (Bankr. D.N.J. 1989), remanded, 119 Bankr. 35 (D.N.J. 1990)
strict	In re Glenn Electric Sales Corporation 89 Bankr. 410 (Bankr. D.N.J. 1988), aff'd, 99 Bankr. 596 (D.N.J. 1988)
strict	In re Greater Pottstown Community Church of Evangelical Congregational Church 80 Bankr. 706 (Bankr. E.D. Pa. 1987)
balancing	In re Main Line Motors, Inc., 9 Bankr. 782 (Bankr. E.D. Pa. 1981)

strict	In re Philadelphia Athletic Club, Inc. 20 Bankr. 328 (Bankr. E.D.Pa. 1982)
balancing	In re Quakertown Glass Co., Inc. 73 Bankr. 468 (Bankr. E.D. Pa. 1987)
strict	In re Star Broadcasting, Inc. 81 Bankr. 835 (Bankr. D.N.J. 1988)

FOURTH CIRCUIT

Bankruptcy Court

strict

In re Tidewater Memorial Hospital, Inc.
110 Bankr. 221 (Bankr. E.D. Va. 1989)

	FIFTH CIRCUIT **Court of Appeals**
balancing	Blackburn-Bliss Trust v. Hudson Shipbuilders, Inc. (In re Hudson Shipbuilders, Inc.) 794 F.2d 1051 (5th Cir. 1986)
balancing	Brennan's, Inc. v. Brennan's Restaurants, Inc. 590 F.2d 168 (5th Cir. 1979)
balancing	Fanelli v. Hensley (In re Triangle Chemicals, Inc.) 697 F.2d 1280 (5th Cir. 1983)
balancing	Pierson & Gaylen v. Creel & Atwood (In re Consolidated BancShares, Inc.) 785 F.2d 1249 (5th Cir. 1986), aff'g in part, remanding in part, 49 Bankr. 467 (N.D. Tex. 1985)

per se	W.F. Development Corporation v. Office of the U.S. Trustee (In re W.F. Development Corporation), 905 F.2d 883 (5th Cir. 1990)
	District Court
strict	Diamond Lumber, Inc. v. Unsecured Creditors' Committee of Diamond Lumber, Inc., 88 Bankr. 773 (N.D. Tex. 1988), aff'g in part, rev'g in part, 77 Bankr. 97 (Bankr. N.D. Tex. 1987)
	Bankruptcy Court
balancing	In re Global Marine, Inc., 108 Bankr. 998 (Bankr. S.D. Tex. 1988), appeals dismissed 108 Bankr. 1007 (S.D. Tex. 1988), appeal dismissed, 108 Bankr. 1009 (S.D. Tex. 1988)

strict	In re Kendavis Industries International, Inc. 91 Bankr. 742 (Bankr. N.D. Tex. 1988)
strict	In re Liberty Trust Company 92 Bankr. 706 (Bankr. W.D. Tex. 1988)
strict	In re Michigan General Corporation 77 Bankr. 97 (Bankr. N.D. Tex. 1987) reh'g denied, 78 Bankr. 479 (Bankr. N.D. Tex. 1987)

	SIXTH CIRCUIT **Court of Appeals**
strict construction	Hunter Savings Association v. Baggott Law Offices Co., L.P.A. (In re Georgetown of Kettering, Ltd.) 750 F.2d 536 (6th Cir. 1984)
balancing	Cle-Ware Industries, Inc. v. Sokolsky (In re Cle-Ware Industries, Inc.) 493 F.2d 863 (6th Cir. 1974) cert. denied 419 U.S. 829 (1974).
	District Court
balancing	United States Trustee v. PHM Credit Corporation (In re PHM Credit Corp.) 110 Bankr. 284 (E.D. Mich. 1990)

	Bankruptcy Court
strict	Roger J. Au & Son, Inc. v. Aetna Ins. Co. (In re Roger J. Au & Son, Inc.) 64 Bankr. 600 (N.D. Ohio 1986), aff'g, 65 Bankr. 322 (Bankr. N.D. Ohio 1984)
rejects strict construction	In re Federated Department Stores, Inc., et al., 114 Bankr. 501 (Bankr. S.D. Ohio 1990)
rejects strict construction	In re Best Western Heritage Inn Partnership 79 Bankr. 736 (Bankr. E.D. Tenn. 1987)
strict	In re Chou-Chen Chemicals, Inc. 31 Bankr. 842 (Bankr. W.D. Ky. 1983)

balancing	In re Hurst Lincoln Mercury, Inc. 80 Bankr. 894 (Bankr. S.D. Ohio 1987)
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balancing	In re P&E Woodworking, Inc. 89 Bankr. 119 (Bankr. D. Idaho 1988)

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SIMULTANEOUS REPRESENTATION IN MULTI-DEBTOR REORGANIZATION CASES

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In re A.H. Robins Co., Inc.; 85-01307-R; E.D.Va.	Mays, Valentine, Davenport & Moore
In re Beker Industries Corp.; In re Beker Phosphate Corp.; 85-B11-709-10; S.D.N.Y.	Kronish, Lieb, & Hellman
In re Braniff Airways, Inc., et al.; N.D. Tx.	Arnold & Porter
In re Buttes Gas & Oil Co., et al.Consol. under 85-07494-H3-11; S.D. Tx.	Sheinfeld, Maley & Kay
In re The Circle K Corporation; 90-5052-PHX-GBN to 90-5075-PHX-GBN; D. Az.	Weil, Gotshal & Manges; Streich Lang Kemp, Smith, Duncan & Hammond
In re Clinton W. Murchison, Jr. 385-30266-11; N.D. Tx.	Palmer, Palmer & Coffee

CASE NAME, CASE NUMBER, DISTRICT	FIRM
In re Tecon Realty Corp.; 385-30929-11	
In re Continental Airlines Corp., et al. 83-04019-H2-5; S.D. Tx.	Weil, Gotshal & Manges
In re Coral Petroleum, Inc.; 83-02460-H2-5; S.D. Tx.	Skadden, Arps, Slate, Meagher & Flom and Sheinfeld, Maley & Kay
In re Dreco Energy Services, et al [Dreco plus 14 subsidiaries] et al; 82-01749-H3-5; 82-01748-H1-5; S.D. Tx.	Fulbright & Jaworski
In re Drexel Burnham Lambert Group Inc., et al.; 90B10421(HCB); S.D.N.Y.	Weil, Gotshal & Manges
In re DRW Property Co. 82, et al [85 cases] Consol. under 485-40510; N.D. Tx.	Haynes & Boone
In re Eagle Bus Manufacturing Inc., Jointly Admin. 90-00985-B-11; S.D. Tx.	Weil, Gotshal & Manges; Decker, Hardt, Kopf, Harr, Munsch & Dinan, P.C.

CASE NAME, CASE NUMBER, DISTRICT	FIRM
In re East Texas Steel Facilities, Inc., f/k/a Lone Star Steel Company; Consol. under 389-33552-HCA-11; N.D. Tx.	Weil, Gotshal & Manges
In re First RepublicBank Corp.; In re IRFB Corp.; 388-34546-SAF-11; 388-34547-SAF-11; N.D. Tx.	Gibson, Dunn & Crutcher
In re GHR Energy Corp., f/k/a Good Hope Refineries, Inc., The GHR Companies, Inc., f/k/a Good Hope Industries, Inc.; 4-83-56G 4-83-60G; D. Mass.	Widett, Slater & Goldman
In re Global Marine Inc. Jointly Admin. 8-00771-H2-11 to 86-00782-H2-11 inclusive; 86-01308-H2-11; 86-11035-H2-11; S.D. Tx.	Weil, Gotshal & Manges
In re Gulfco Investment Corp., et al. BK-74-484 Okla.	Conner, Little & Conner

CASE NAME, CASE NUMBER, DISTRICT	FIRM
In re HRT Industries, Inc., also d/b/a Zodys, Zody's Discount Dept. Stores; and Zodys, f/k/a Hartfield-Zodys, Inc. and formerly d/b/a Hartfields, Debtor; 82B12263(BL); S.D.N.Y.	Weil, Gotshal & Manges
In re Johns-Manville Corp., et al.; 82B11656 through 82B11676; S.D.N.Y.	Levin & Weintraub & Crames
In re KDT Industries, Inc.; 82-B-11453 through 82-B-11515 inclusive; 82-B-11687 through 82-B-22718 inclusive; 83-B-11642 through 83-B-11645 inclusive; S.D.N.Y.	Levin & Weintraub & Crames
In re the Lionel Corporation, Lionel Leisure, Inc., Consolidated Toy Co.; 82B-10318-10320(EJR)	Olwine, Connelly, Chase, O'Donnell & Weyher, Esqs.
In re MCorp Financial, Inc.; In re MCorp Management; In re MCorp; 89-02312-H3-11; 89-02324-H5-1189-02848-H2-11; S.D. Tx.	Weil, Gotshal & Manges

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Ohio Partners Oil Company, DOC Service Co., and Paroco Drilling Funds Inc., and a/k/a DOC Marketing Co.	
In re O.P.M. Leasing Services, Inc., Cali Trading Int'l, Ltd.; 81B-10533; S.D.N.Y.	Zalkin, Radin & Goodman
In re Partners Oil Co. successor by merger to Daniel Oil Co.; 83-01577-H3-5; S.D. Tx.	Porter & Clements
In re Revere Copper and Brass, Inc., et al.; 82B-12073(PBA); S.D.N.Y.	Weil, Gotshal & Manges

CASE NAME, CASE NUMBER, DISTRICT	FIRM
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In re Sambo's Restaurants, Inc.; LA-81-15593; S.D. Ca.	Stutman, Treister & Glatt
In re Storage Technology Corporation, et al.; 84B-33775 D. Co.	Stutman, Treister & Glatt
In re Tecon Realty Corp.; 385-30929-11	
In re Texaco Inc.; Jointly Admin.; 87-B-20142(HS); 87-B-20143(HS); 87-B-20144(HS); S.D.N.Y.	Weil, Gotshal & Manges; Cravath, Swaine & Moore Kaye Scholer Fierman Hays & Handler
In re Unishops, Inc.; In re Middletown Center, Inc.; 73-B-1208; S.D.N.Y.	Levin & Weintraub
In re United Merchants and	Levin & Weintraub

CASE NAME, CASE NUMBER, DISTRICT	FIRM
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In re The White Motor Credit Corp., White Motor Corporation, Gemini Mfg. Co., White Motor Corp. of Canada, Ltd.; 83-3200 through 83-3386B80-3361; N.D. Ohio	Levin & Weintraub

OTHER MULTI-DEBTOR REORGANIZATION CASES WITH SIMULTANEOUS REPRESENTATION

In re AM International
(82B04922)

In re Amitex

In re Commonwealth Oil (W.D. Tx.)

In re Frontier Airlines, Inc.
(86B8021E)

In re Great Western Sugar,
Godchaux-Henderson Sugar Co.,
Northern Ohio Sugar Co.
(N.D. Tx.)

In re Imperial 400 Nat'l., Inc.
(B656-65)

In re Lewis W. Shurtleff, Inc.;
In re Frontier Properties
(S.D. Ca.)

In re LTV Corp.
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In re McClouth Steel Corp.

In re Salem Mortgage Co., et al.

In re Smith Int'l Corp.

In re Toys 'R' Us, Inc.
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In re Two Guys from Massapequa, Inc.
(E.D.N.Y.);

In re Crib, Carriage Toy Distributors, Inc.

In re UNR Industries, Inc., et al.
(82B9841-9851)

In re Wickes Companies

In re W.T. Grant Co. (75B1735)

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No. 90-1043

In the Supreme Court of the United States

OCTOBER TERM, 1990

W.F. DEVELOPMENT CORPORATION, ET AL., PETITIONERS

v.

OFFICE OF THE UNITED STATES TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioners—limited partnerships and their common general partner—were debtors in cases under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et seq.* The question presented is whether counsel should have been disqualified from representing all of the debtors on the ground that the debtors' partnership relations result in a disqualifying conflict of interest under 11 U.S.C. 101(13) and 327(a).

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1043

W.F. DEVELOPMENT CORPORATION, ET AL., PETITIONERS

v.

OFFICE OF THE UNITED STATES TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals, Pet. App. A1-A5, is reported at 905 F.2d 883. The decisions of the district court, Pet. App. C1-C15, and the bankruptcy court, Pet. App. D1-D3, E1-E2, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1990. A petition for rehearing was denied on August 24, 1990. Pet. App. B1-B2. The petition for a writ of certiorari was filed on November 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The commencement of a case under the Bankruptcy Code (Code) creates an estate in which all property rights of the debtor vest. 11 U.S.C. 541. In a case under Chapter 11 of the Code, the debtor remains in possession of the estate and operates the business as it attempts to restructure its affairs and formulate a plan for reorganization. 11 U.S.C. 1108, 1121. The debtor may be removed from possession of the estate and a trustee may be appointed upon demonstrating cause. 11 U.S.C. 1104. If a trustee is not appointed, the "debtor in possession" has virtually the same rights and fiduciary obligations as a trustee serving in the case. 11 U.S.C. 1107(a).

To assist in carrying out its duties, the debtor in possession may employ professionals "that do not hold or represent an interest adverse to the estate and that are disinterested persons." 11 U.S.C. 327(a). The debtor must submit a formal application to the bankruptcy court and must disclose any conflicts of interest in order to ensure that the estate does not employ professionals with divided loyalties.

"Disinterested person" is defined in 11 U.S.C. 101(13). Subparagraphs (A) through (D) of that provision set forth specific categories of persons who are not "disinterested."[1] In addition, subparagraph (E) of Section 101(13) broadly provides that a professional is not "disinterested" if he has any interests that are "materially adverse" to those of the bankruptcy estate or any class of creditors or equity holders due to "any direct or indirect relationship to, connection with, or interest in, the debtor * * * or for any other reason." 11 U.S.C. 101(13)(E).

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[1] Such persons (including creditors and insiders) will often also have interests "adverse to the estate" – independent grounds for disqualification under Section 327(a).

2. This case involves four debtors: W.F. Development Corporation (WF); Golf Hills Apartments, Ltd. (Golf Hills); Westover Valley, Ltd. (Westover); and Lackland Court Apartments, Ltd. (Lackland). Golf Hills, Westover, and Lackland were Texas limited partnerships that shared a common general partner—WF. Pet. App. C2. In late 1987, each of the limited partnerships filed for bankruptcy under Chapter 11, and each applied for permission to employ St. Clair Newbern, III (Newbern) as counsel. *Id.* at C2-C3. Respondent did not object to the applications, and the court initially approved them. *Id.* at A2.

Subsequently, in December 1987, WF filed for bankruptcy protection, and it, too, requested permission to employ Newbern as counsel. Pet. App. A2. Respondent objected to Newbern's employment, and the bankruptcy court conducted three separate hearings concerning that objection. *Id.* at A2, C4. At the conclusion of the third hearing, the bankruptcy court disqualified Newbern from representing WF pursuant to Sections 105 and 327 of the Code. Pet. App. C4, D1-D2. The bankruptcy court also disqualified Newbern from representing Golf Hills, Westover, and Lackland and, pursuant to 11 U.S.C. 328, ordered Newbern to disgorge all fees and retainers that he had received. Pet. App. D1-D2.

3. WF and the limited partnerships appealed to the United States District Court for the Northern District of Texas. The district court affirmed the bankruptcy court's order disqualifying Newbern, stating that "it is clearly a conflict of interest for an attorney to represent both general and limited partners in the same bankruptcy proceeding." Pet. App. C9.[2]

4. The court of appeals affirmed, holding that because "limited and general partners * * * hold materially adverse

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[2] The opinions of the district court and the court of appeals generally describe the limited partnership debtors as "limited partners" of WF.

positions," the "potential for conflict will always exist" if the same attorney represents both interests. Pet. App. A3-A4. Thus, the court adopted a "clear rule" that "[w]hen one attorney represents both limited and general partners in bankruptcy, there will always be a potential for conflict and disqualification is proper." *Id.* at A3.

ARGUMENT

Because the limited partnership bankruptcy cases have been dismissed and the WF case has been converted to a case under Chapter 7 of the Code, this matter is not justiciable. Moreover, the decision here does not conflict with any decision of this Court or of any court of appeals. Further review therefore is not warranted.

1. The bankruptcy cases of all of the limited partnership debtors have been dismissed.[3] Therefore, the limited partnerships' applications to employ Newbern as counsel no longer present an "actual, ongoing" controversy. *Lewis* v. *Continental Bank Corp.*, 110 S. Ct. 1249, 1253 (1990); *Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988).

Although WF's bankruptcy case is still pending, it was converted to a liquidation case under Chapter 7 of the Code on January 4, 1989. The disqualification order challenged by WF was issued pursuant to WF's application to employ counsel in its capacity as a debtor in possession under Chapter 11 of the Code. Since WF's bankruptcy case has been converted to one under Chapter 7, WF is no longer a debtor in possession and is therefore not empowered to employ counsel on behalf of the bankruptcy estate. Thus, the bankruptcy court's order of disqualification has no continuing effect on WF or the Chapter 7 estate.

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[3] The government has been advised that Golf Hills' bankruptcy case was dismissed on May 23, 1988; Westover's case was dismissed on October 6, 1988; and Lackland's case was dismissed on February 1, 1989.

Although the bankruptcy court's disgorgement order still has a continuing effect on Newbern, Newbern merely represented WF and the limited partnership debtors in their appeals; he did not appeal the bankruptcy court's order on his own behalf. Cf. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988) (failure to file notice of appeal in accordance with specificity requirement of Fed. R. App. P. 3(c) is jurisdictional defect); *FTC* v. *Amy Travel Serv., Inc.*, 894 F.2d 879, 880-881 (7th Cir.) (Fed. R. App. P. 3(c) requires that attorney be named in notice of appeal from order imposing Rule 11 sanctions), cert. denied, 110 S. Ct. 366 (1989). Because Newbern was not a party in any of the previous appeals in the courts below, he is not a petitioner in this case. Cf. *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 543-549 (1986) (standing to appeal in official capacity as school board member does not confer standing to appeal in individual capacity); Sup. Ct. R. 12.2 (only "[p]arties" may join in a petition for writ of certiorari filed by another party).[4]

2. Even if this case were justiciable, review by this Court would not be warranted. There is no conflict among the circuits on the question whether counsel may simultaneously represent limited partnerships and their general partner in bankruptcy.[5] In fact, the Fifth Circuit is the only court of appeals to have addressed that question.[6]

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[4] WF and the limited partnerships may not challenge the bankruptcy court's disgorgement order because that order – which would require return of monies that they had previously been paid to Newbern – does not adversely affect any of their protected legal interests.

[5] There is also no circuit conflict concerning the simultaneous representation of limited and general *partners* in bankruptcy – a situation which the facts of this case did not present, but which the per se rule adopted by the court of appeals nevertheless addresses in *dictum*.

[6] Cf. *In re Georgetown of Kettering, Ltd.*, 750 F.2d 536 (6th Cir. 1984) (counsel represented limited partnership and general partner, but court disqualified employment and denied compensation on the ground that counsel also represented a creditor of debtors).

All of the allegedly conflicting cases cited by petitioners are readily distinguishable. The First and Eighth Circuit cases cited by petitioners involve an attorney's retention of a security interest in the debtor's property to ensure payment of his fees. See *In re Martin*, 817 F.2d 175 (1st Cir. 1987); *In re Pierce*, 809 F.2d 1356 (8th Cir. 1987). A per se rule disqualifying any attorney who takes a security interest in the property of the debtor, regardless of the nature of the interest, would be more difficult to justify than the per se rule at issue here. The former rule would make it difficult for some debtors to retain competent counsel, since debtors might not have sufficient funds to pay the cash retainer that virtually all attorneys would require in the absence of a security interest. *In re Martin*, 817 F.2d at 181. In contrast, the per se rule adopted in this case does not impair a debtor's ability to obtain legal services. The rule at issue here only prohibits a general partner in bankruptcy from employing the particular attorney(s) who represent related limited partnership interests; it does not diminish the supply of qualified attorneys willing to perform legal services for the general partner.[7]

The Second Circuit cases that petitioners cite, Pet. 23, are likewise inapposite. *In re International Oil Co.*, 427 F.2d 186 (1970) (per curiam); *Katz* v. *Kilsheimer*, 327 F.2d 633 (1960). Both *Katz* and *International Oil* were decided prior to the enactment of the 1978 Bankruptcy Code, and neither case involved partnership debtors. The issue in both cases concerned whether the presence of interaffiliate claims

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[7] The other Eighth Circuit case cited by petitioner, *In re Daig Corp.*, 799 F.2d 1251 (1986), has no relevance to this case. In *Daig Corp.*, the court concluded that a professional consulting firm holding a warrant to purchase common stock of the debtor was not a "disinterested person" because the holder of a stock purchase warrant is an "equity security holder" within the meaning of 11 U.S.C. 101(13)(A). 799 F.2d at 1253.

between a parent corporation and its subsidiaries required the appointment of separate trustees for each of the entities. In *Katz*, the court decided to delay a decision on that issue pending briefing and an additional hearing on the matter. *Katz*, 327 F.2d at 636. In *International Oil*, the court concluded in a one-page, per curiam opinion that the interaffiliate claims were not "sufficient to saddle the[] estates with the expense of separate trustees and trustees' attorneys at the present time." *International Oil*, 427 F.2d at 187. The preceding quotation is the only reference in the opinion suggesting that employment of counsel was even at issue in that case.

Of the earlier Fifth Circuit cases petitioners cite, Pet. 43-50, only one concerns an issue that is even arguably similar to the issue raised here. That case is *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249 (1986). *Consolidated Bancshares* involved an alleged conflict of interest arising from the dual representation of a debtor corporation and one of its officers or directors. The court ordered a remand in that case in order to determine whether a conflict of interest was in fact presented. As the Fifth Circuit below explained in distinguishing *Consolidated Bancshares*, Pet. App. A3-A4, the earlier decision did not hold that an in-depth factual analysis is necessary in every conflict-of-interest case. Even if the Fifth Circuit's analysis of its prior decision is wrong, review by this Court is not needed to resolve such an intracircuit conflict. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Contrary to petitioners' argument, Pet. 51-54, the decision of the court of appeals does not conflict with this Court's decision in *Woods* v. *City Nat'l Bank & Trust Co.*, 312 U.S. 262 (1941). The Court in *Woods* emphasized that a claimant who represents conflicting interests in a bankruptcy proceeding should be denied fees even though "fraud or unfairness were not shown to have resulted." *Id.* at

268. The Court did not suggest that a detailed evidentiary record must be created in every case before disqualification may be ordered where, as here, a conflict of interest is facially apparent. If anything, it suggested the contrary.

3. Petitioners misapprehend the court of appeals' rule when they suggest that it applies equally to all "jointly administered cases"[8] involving "affiliated debtors." Pet. 7. Nothing in the court of appeals' decision supports that contention. This case presents the question of whether an attorney may simultaneously represent limited partnership debtors and a general partner debtor. The court of appeals focused solely on the special problems that partnerships present and did not suggest that its holding reached beyond the partnership context. See Pet. App. A3.

In the court of appeals' view, the diverse obligations of a general partner, and the conflicts of interest that result from those obligations, justify creation of a per se rule of disqualification in this limited context. A general partner not only has an ownership interest in the limited partnership, he is personally liable to creditors for partnership debts, see Tex. Rev. Civ. Stat. Ann. art. 6132a-1, § 4.03(b) (Vernon 1990); Tex. Rev. Civ. Stat. Ann. art. 6132b, § 15 (Vernon 1990).[9] When a limited partnership becomes in-

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[8] Contrary to petitioners' suggestions, Pet. 7, there is no indication that the four bankruptcy cases at issue here were ordered to be jointly administered. See Bankruptcy Rules 1015 and 2009.

[9] Under 11 U.S.C. 723, a trustee or debtor in possession for a limited partnership has the right to proceed against a general partner for a deficiency in the assets of the limited partnership. Although a partnership's claim under Section 723 may be directly asserted only in Chapter 7 cases, Section 723 also has an impact on Chapter 11 cases because creditors in a Chapter 11 case are entitled to payments that at least equal what they would be entitled to receive in a Chapter 7 case. See 11 U.S.C. 1129(a)(7)(A)(ii). Moreover, some states, including Texas, permit creditors to sue a general partner directly for any limited partnership debts without first exhausting the limited partnership's assets. See *Foster v. Daon Corp.*, 713 F.2d 148, 151 (5th Cir. 1983).

solvent, the general partner has an incentive to file for bankruptcy in order to place the assets of the general partner beyond the reach of the limited partnership and its limited partners and creditors. A per se disqualification rule is justified, according to the court of appeals, to avoid conflicts of interest (or appearances of conflict) that might otherwise arise from the simultaneous representation of a general partner and a partnership or its limited partners.[10] Accordingly, decisions of district courts and bankruptcy courts have generally prohibited the dual representation of partners and partnerships in bankruptcy cases.[11]

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[10] Because the conflict identified by the court of appeals is between the limited partnerships and the general partner, Pet. App. A3-A4, only the general partner needs separate counsel. Petitioners are therefore incorrect in suggesting, Pet. 32, that each limited partner and limited partnership would necessarily need separate counsel.

The court of appeals' per se rule is not necessarily transferrable from limited partnership bankruptcies to corporate bankruptcies. Unlike the general partner, a shareholder is not personally liable for the debts of his corporation unless he enters into an agreement to guarantee the debts. Therefore, simultaneous representation of a general partner and a limited partnership (or limited partner) creates difficulties that are not present in many corporate bankruptcies.

[11] See, *e.g.*, *In re Downtown Inv. Club III*, 89 Bankr. 59 (Bankr. 9th Cir. 1988) (prohibiting dual representation of limited partnership and its general partner, but finding it unnecessary to adopt a per se rule); *In re Hathaway Ranch Partnership*, 116 Bankr. 208 (Bankr. C.D. Cal. 1990) (prohibiting dual representation of limited partnership and the general partner of its general partner, but finding it unnecessary to adopt a per se rule); *In re Kuykendahl Place Associates, Ltd.*, 112 Bankr. 847 (Bankr. S.D. Tex. 1989) (prohibiting dual representation of limited partnership debtor and the general partner of its sole limited partner, where the general partner guaranteed the debts of the limited partnership); *In re McKinney Ranch Associates*, 62 Bankr. 249 (Bankr. C.D. Cal. 1986) (per se prohibition of dual representation of limited partnership and its general partners); see also *In re Kendavis Indus. Int'l, Inc.*, 91 Bankr. 742 (Bankr. N.D. Tex. 1988) (advocating, in

4. Petitioners characterize the court of appeals' decision as "having determined that disgorgement should be [automatically] ordered as a consequence of simultaneous representation." Pet. 58. The per se rule adopted by the court of appeals, however, concerns only *disqualification*; the rule does not address the separate issue of disgorgement. See Pet. App. A3. Although the court of appeals did affirm the bankruptcy court's order that Newbern disgorge his fees, that result presumably rested on the court of appeals' determination that the bankruptcy court did not abuse its considerable discretion under 11 U.S.C. 328(c). Nothing in the opinion suggests that the disgorgement order rested on a per se rule requiring that result.

5. Petitioners argue, Pet. 34-36, that the specific prohibited relationships found in Section 101(13)(A)-(D) and the per se rule found in the prior version of 11 U.S.C. 327(c),[12] demonstrate that it is readily apparent when Congress intends to legislate per se rules of disqualification. According to petitioners, the failure explicitly to legislate the strict rule adopted by the court of appeals indicates that Congress did not intend such a rule.

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dicta, a per se rule against dual representation of partnership entities); cf. *In re Vanderbilt Associates, Ltd.*, 117 Bankr. 678 (D. Utah 1990) (permitting dual representation of two limited partnerships having the same general partner where the general partner was not a debtor in bankruptcy). But cf. *In re Waterfall Village of Atlanta, Ltd.*, 103 Bankr. 340, 345-346 (Bankr. N.D. Ga. 1989) (permitting representation of limited partnership debtor in bankruptcy proceeding by attorney who represented—in unrelated matters—corporation that wholly owned the joint venture partner of the sole general partner).

[12] Prior to its amendment in 1984, 11 U.S.C. 327(c) (1982) prohibited employment of counsel by a trustee or debtor in possession if such counsel also represented a creditor of the debtor. Section 327(c) no longer prohibits representation solely because counsel represents a creditor, but provides that such dual representation is prohibited if another creditor objects to the representation and there is an actual conflict of interest.

That argument is wide of the mark. Section 101(13)(E) expressly excludes from the category of "disinterested person[s]" professionals who have a "materially adverse" interest "by reason of any direct or indirect relationship to, connection with, or interest in, the debtor * * * or for any other reason." This extremely broad language certainly permits the court categorically to prohibit dual representation in situations where an appearance of or actual conflict of interest is likely to arise. Cf. *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (interpreting Exemption 7(A) of FOIA as supporting a categorical rule that rap sheets are excluded from FOIA's disclosure requirements); *Fook Hong Mak* v. *INS*, 435 F.2d 728, 730 (2d Cir. 1970) (discretionary authority does not logically foreclose the power "to determine by appropriate rulemaking that [the decisionmaker] will not use it in favor of a particular class on a case-by-case basis").

6. Petitioners argue that "equitable principles" preclude the adoption of a per se rule here. Pet. 62. But petitioners misapprehend the reason that bankruptcy proceedings are equitable in nature. Bankruptcy courts have equity powers in order to ensure that claimants are treated fairly and that the integrity of the bankruptcy process is preserved. See *Pepper* v. *Litton*, 308 U.S. 295, 307-308 (1939). Those powers may not be invoked to authorize attorneys to represent competing interests in bankruptcy. And there is nothing "inequitable" about a rule which protects debtors, creditors, and the courts from the actual and potential conflicts that may arise from dual representation in the partnership context.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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